

NTSB Order No. EA-4517

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 20th day of December, 1996

Docket 210-EAJA-SE-13573

Applicant has appealed from the initial decision of Administrative Law Judge William A. Pope, II, served September 30, 1994, denying his application for \$11,576.78 in attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. 504.¹ As discussed below, the appeal is granted, and the case is remanded for a determination of the amount of EAJA

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fees and expenses to be awarded.

This EAJA action arises from an enforcement proceeding in which the Administrator sought to suspend applicant's pilot certificate for 90 days on allegations that he violated 14 C.F.R. 91.107(a) and 91.13(a)² by piloting, on September 7, 1992, a Brooks Range-Prudhoe Bay, Alaska flight when there was no approved seat or safety belt available for a passenger who was seated on a duffel bag. The allegations, denied by the applicant, were never litigated because the law judge then assigned to the case (Jerrell R. Davis) granted applicant's motion to dismiss the Administrator's complaint as stale, pursuant to our stale complaint rule.³

² **§ 91.107 Use of safety belts, shoulder harnesses, and child restraint systems.**

(a) Unless otherwise authorized by the Administrator --
* * *

(3) Except as provided in this paragraph, each person on board a U.S.-registered civil aircraft . . . must occupy an approved seat or berth with a safety belt and, if installed, shoulder harness, properly secured about him or her during movement on the surface, takeoff, and landing. * * *

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³ Our stale complaint rule (49 C.F.R. 821.33) provides, in pertinent part:

§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for

In dismissing the complaint as stale, Judge Davis recognized that the Administrator is entitled to pursue a facially stale complaint where, as in this case, the potential violation was discovered some time after its occurrence, so long as the Administrator processes such a case "with greater dispatch than [it] would otherwise receive."⁴ However, because Judge Davis was not persuaded that that standard had been fully met, notwithstanding the fact that the notice of proposed certificate action was issued on September 28, 1993, only 90 days after the FAA learned of the incident on June 30, 1993, he dismissed the complaint. An appeal from the dismissal of the complaint was subsequently withdrawn by the Administrator, and this EAJA application followed.

The EAJA requires the government to pay a prevailing party, such as the applicant in this case, certain attorney fees and costs unless the government establishes that its position was substantially justified, or that special circumstances would make

(..continued)

proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

⁴ Administrator v. Holland, NTSB Order No. EA-3987 at 5 (1993), citing Administrator v. Brea, NTSB Order No. EA-3657 (1992). In Holland, we explained that the Administrator must demonstrate that the entire processing of the case was expedited so as to minimize any further delay.

an award of fees unjust. 5 U.S.C. 504(a)(1). To find that the Administrator was substantially justified in a routine EAJA case, that is, one in which his charges are not sustained following adjudication, we must find that his position was reasonable in fact and law, i.e., that he had a reasonable factual and legal basis for believing that the alleged violations had occurred. See McCrary v. Administrator, 5 NTSB 1235, 1238 (1986); U.S. Jet v. Administrator, NTSB Order No. EA-3817 at 2 (1993). However, in a case such as this one, decided on a procedural ground, rather than on the merits, a determination as to substantial justification must focus not on the adequacy of the underlying legal theory and the strength or weakness of the evidence that would have been submitted had the charges been litigated, but on the judgment to pursue a matter that might not weather a procedural challenge to the Administrator's right *vel non* to litigate the charges. In other words, the inquiry as to substantial justification in this case obligated the Administrator to show that his decision to prosecute a facially stale complaint was reasonable, as arguably consistent with Board precedent establishing the circumstances under which the prosecution of a stale complaint will be permitted. We are not satisfied that the Administrator discharged that obligation here.

In his order denying applicant's EAJA claim, Judge Pope⁵

⁵ Because Judge Davis retired soon after rendering his decision on the stale complaint issue, handling of the EAJA portion of this case was assigned to Judge Pope.

correctly found that only the staleness issue was properly before him, since applicant did not "prevail" on the merits of the complaint. Our point of departure with the law judge is his subsequent conclusion that, notwithstanding the Administrator's ultimately unsuccessful position before Judge Davis that his prosecution of the stale charge met the "good cause" exception to our stale complaint rule, the Administrator had a *reasonable basis for arguing* that it did.⁶ We conclude otherwise.⁷

Judge Pope in his thorough decision painstakingly analyzed each stage of the Administrator's handling of the case, from the date the FAA learned (June 30, 1993) of the possible September 7,

⁶ See Caruso v. Administrator, NTSB Order No. EA-4165 at 7 n. 8 (1994), where we held that issuance of a notice of proposed certificate action four months after discovery of the alleged violations established that the Administrator acted reasonably within the meaning of the "substantial justification" standard for EAJA recovery. We cautioned, however, "[t]his is not to say that the Administrator would have prevailed at hearing on this issue, as precedent . . . requires a showing of reasonable dispatch after discovery of the alleged violations. But the standard of review at the EAJA stage does not require the certainty of a favorable outcome, *only a reasonable basis for proceeding.*" (Emphasis added.)

⁷Given our disposition of this issue, we need not determine whether Judge Pope inappropriately substituted his judgment for that of Judge Davis on the merits of the stale complaint issue when, for example, he stated his view that the applicant "was extremely lucky to have obtained dismissal on staleness grounds."

I.D. at 19. We do, however, agree with applicant that Judge Pope inappropriately struck a number of exhibits from the record in this case. Our EAJA rules provide that an application may include "any other matter that the applicant wishes this agency to consider in determining whether and in what amount an award should be made" (49 C.F.R. 826.21(d)); and that if the Administrator's answer "is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 826.36" (49 C.F.R. 821.32(c)).

1992 violation until issuance of the notice of proposed certificate action (September 28, 1993). He found that the time spent at each stage was reasonable and, therefore, the pace of the Administrator's handling of this case could not form the basis for an EAJA award. Even if we were to assume, *arguendo*, that Judge Pope properly determined that the processing of this case was either reasonably expeditious or not unreasonably delayed,⁸ we would not be persuaded that the case received the expedited treatment our cases explicitly hold it must to avoid dismissal for staleness.

The Administrator's affirmative burden with respect to this EAJA application was not simply to demonstrate that the case was processed with reasonable expedition, or did not languish, at each step of its progression from discovery of the possible violation to notice to the applicant of a proposed impact on his certificate. Rather, his burden was to show that *less* time was consumed in processing the matter than would have been taken had the matter been discovered at about the time of its occurrence. That burden contemplates the production of such information as may be necessary to enable the Board to assess, by comparative analysis, whether the case was in fact expedited in recognition of its staleness, that is, moved more quickly through all investigative and review stages than a nonstale case would have

⁸ We have said that in processing facially stale charges after gaining belated awareness of them, the Administrator must "minimize any further delay." Administrator v. Brea, NTSB Order No. EA-3657 (1992).

been. Our review of the record, however, convinces us that the Administrator made no attempt to demonstrate that this matter had received the heightened attention and accelerated consideration our precedent makes clear a stale complaint must be afforded to survive dismissal under our rule.⁹ Without such a showing, we are not persuaded that he could reasonably argue that the prosecution of an incident that was nine months old when he learned of it fit the rule's exception for charges not contemporaneously discovered.

⁹It appears that the Administrator would have us infer the necessary dispatch from the fact that the matter "only" took three months to process. We will not indulge such inferences, for they derive from a premise the Board long ago rejected, namely, that adequate expedition should be discerned in any case in which the Administrator acts in less than six months. See, e.g., Administrator v. Lujan, 4 NTSB 153, 154 (1982). In any event, we have no way of accurately gauging whether the time consumed in processing this case is typical for a relatively simple and straightforward charge or whether some purposeful effort was made, out of concern for the potential obstacle to prosecution Rule 33 posed for the charge, to trim either the procedures normally followed or the time ordinarily expended in completing them.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is granted;
2. The initial decision denying attorney fees and expenses is reversed; and
3. The case is remanded to the law judge for a determination of the amount of EAJA fees and expenses to which the applicant may be entitled.

HALL, Chairman, HAMMERSCHMDIT and GOGLIA, Members of the Board, concurred in the above opinion and order. FRANCIS, Vice Chairman, and BLACK, Member, did not concur.